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PREFATORY STATEMENT

Petitioner, CHARLES TOLIVER, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 28, 1970.

OPINIONS BELOW

The Opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition. The Opinion of the District Court, denying Petitioner's Motion to Suppress and entering Judgment on the verdict of guilt are not reported. The oral opinion of the District Court denying Petitioner's Motion to Suppress and denying Petitioner's Motion For Rehearing is set forth in Appendix B. The formal written judgment of guilt

is set forth in Appendix C. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner's co-defendant was stopped by agents of the Bureau of Narcotics and Dangerous Drugs. Thereafter, the agents observed contraband in plain view. May the subsequent observation of contraband be considered in determining whether probable cause to arrest existed at the time the automobile was stopped.

2. Petitioner challenged the search and seizure made by the agents of the vehicle belonging to the co-defendant in the District Court on several occasions, including a Motion to Suppress, a Motion to Reconsider the denial of the Motion to Suppress, and Motion for New Trial.

Throughout these proceedings in the trial court, the Government never questioned Petitioner's standing to challenge the search. The question is whether the Government can challenge standing for the first time in the Court of Appeals.

3. With the automobile of Petitioner's co-defendant in the possession and under the control of Bureau of Narcotics and Dangerous Drugs agents, immediately in front of a Highway Patrol station, and with the owner and only passenger thereof under arrest nearby, may law enforcement agents conduct a search of a vehicle without a search warrant.

4. Whether affidavit establishes probable cause for issuance of a search warrant when the affidavit

a) Discloses affirmatively

that the informant was unknown to the affiant,

b) Contains no information establishing past reliability of the informant,

c) Fails to state facts demonstrating a reasonable probability that the automobile to be searched contained contraband.

5. Whether a search pursuant to warrant may be upheld based on evidence not submitted to the issuing magistrate.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides,

> "The right of the people to be secure in their persons, houses, papers, and effects, as against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The basis for Federal jurisdiction in the Court of first instance were the provisions of 18 U.S.C. § 3231 and Rule

18 of the Federal Rules of Criminal Procedure, which are set forth in Appendix D.

On July 31, 1969, at approximately 5:30 p.m. a call was received at the office of the Bureau of Narcotics and Dangerous Drugs. The identity of the caller was unknown to Agent Krusko.

Immediately thereafter, Agent Gillerman advised Agent Krusko that the informant was known to him and had provided the Bureau of Narcotics and Dangerous Drugs with reliable information in the past. At the conclusion of this phone conversation, Agent Krusko, accompanied by five other narcotic agents, proceeded to an area identified by the informant in Oakland, California, referred to as the Grove Street Area. The agents took two cars to this location, one

containing four agents, the other, two.

The Oldsmobile the informant had described was already at the Grove Street location when the agents arrived and Maxfill was observed standing near it. He was dressed according to the informant's description and was accompanied by a female negro wearing a natural or Afro hairdo.

At approximately 6:20 p.m. Toliver arrived at the location driving a red sports car. After a short conversation with the men, the female left and entered a nearby building. Toliver then entered the Oldsmobile and with Maxfill driving, the two men traveled to the corner of Brush and 20th Streets in Oakland. The trip took less than ten minutes.

After the Oldsmobile was parked,

Toliver got out and proceeded to walk a short distance to the trunk of a 1959 yellow Thunderbird. He opened the trunk of that car, reached in, and removed a brown paper bag. He returned to the Oldsmobile carrying the bag and got in. Both Maxfill and Toliver then returned to the Grove Street location.

When Maxfill and Toliver got out of the car, it was observed that neither man was carrying anything. They then entered a building located at 4606 Grove Street. From this point until arrested Toliver was not again observed by the agents.

After approximately two minutes, Maxfill returned to the Oldsmobile where he was met by the unidentified female negro and both entered the car and drove away. The surveillance

vehicles followed the Maxfill car to the San Francisco-Oakland Bay Bridge Toll Plaza. The trip took approximately ten minutes and Agent Krusko testified that Maxfill drove in an ordinary manner. Nothing suspicious whatsoever was observed by the agents during this trip.

Maxfill was driving in an ordinary manner and it was very easy for Krusko to follow him. When the defendant's car approached the toll booth it was situated directly between the two surveillance automobiles and when Krusko's automobile came to a stop, the defendant did likewise, as did the second surveillance car. The defendant's car was in fact "blocked" in and it clearly appears from Krusko's testimony that the defendant found himself in this blocked-in position long before any agent had

a possibility to observe and contraband that might have been lying in open sight. It is also clear that more than one agent approached the defendant's car.

As Krusko approached Maxfill's vehicle he presented his credentials at the window and announced that he was a narcotics agent conducting an investigation. Maxfill began to get out of the vehicle and as he did so Krusko observed what he believed to be narcotics in a litter bucket on the floor of the front seat.

After Maxfill exited the vehicle and was formally advised that he was under arrest, Krusko removed the litter from the floor of the vehicle and discovered the heroin on which prosecution was based.

Late in the evening hours of July 31, 1969, Agent Krusko signed an

Affidavit in support of a search warrant for the search of the 1959 Ford Thunderbird automobile. The Affidavit is reprinted in Appendix E. The Affidavit reflected that the affiant did not know the informant by name or voice. The Affidavit did not state facts indicating past reliability of the informant. It did not reflect the agents' observation of other bags in the trunk of the Thunderbird. In fact, the Affidavit disclosed no reason to believe that the Thunderbird contained contraband. The Thunderbird was searched and additional herion discovered.

An indictment charging Maxfill and Toliver with two counts of violating Title 21 U.S.C. § 174, Concealment and Transportation of Herion, was filed on September 24, 1969. Among other motions, Maxfill and Toliver moved to suppress

the narcotics on October 24, 1969. An evidentiary hearing was held on November 19 and 20, 1969 in connection with the defendants' Motion for Suppression, after which hearing the Motion was denied. On February 6, 1970, Toliver moved for reconsideration of the Court's ruling on the Motion To Suppress, which Motion was denied by the Court on February 12, 1970.

At the conclusion of the trial on March 6, 1970, the jury returned a verdict of guilty as to both Counts I and II of the Indictment. The Judgment and Commitment was entered on March 27, 1970. Notice of Appeal was filed immediately thereafter on March 27, 1970.

REASONS FOR GRANTING WRIT

1. Maxfill's automobile was

stopped at the Oakland Bay Bridge before the officers observed contraband. Stopping the vehicle constituted an arrest and observations thereafter made cannot be considered in determining probable cause. In Henry v. United States, 361 U.S. 98 (1959), this Court held,

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by

what the subsequent search discloses, as Johnson v. United States, supra, holds."
361 U.S. at 103.

The Court of Appeals for the Ninth Circuit in the instant case held at page 4 of its Opinion:

"The transaction which was unfolding was obviously devious, clandestine and suspicious. It thoroughly warranted the action of Krusko on following Maxfill to the bridge. Once there Maxfill unknowingly boxed himself in. He drove up behind one surveillance car already stopped at the toll line and gave Krusko an opportunity to get out and walk up to Maxfill, identify himself and ask for identification. Maxfill turned to get out of the car, Krusko

then noticed what appeared to him, as an experienced narcotics agent, to be heroin in plain view inside the car. Probable cause for the arrest existed at this moment and Krusko proceeded to make it." (emphasis added)

While the District Court and Court of Appeals considered the observation in determining probable cause, Henry precludes consideration of the observation made after the vehicle was stopped in determining probable cause.

2. Petitioner in the District Court filed a Motion to Suppress the evidence seized from the Maxfill vehicle, which Motion was denied. Thereafter, Petitioner filed a Motion for Reconsideration and a Motion for New Trial, both of which raised the issue of the search from the Maxfill vehicle, and both of which were

denied. At no time did the Government object to Petitioner's standing to challenge the search in the trial court.

For the first time, the Government challenged Petitioner's standing in the Court of Appeals. The Court of Appeals for the Ninth Circuit completely ignored the Government's failure to challenge standing in the District Court. The decisions of this Court in Lawn v. United States, 355 U.S. 339 (1958); Husty v. United States, 282 U.S. 694 (1931); and Dulgnan v. United States, 274 U.S. 195 (1927), and the decisions in other Circuits such as United States v. Priest, 419 F.2d 570 (10th Cir. 1970); McCollough v. United States, 403 F.2d 1013 (9th Cir. 1968); Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); and United States v. Shelton, 249 F.2d

871 (7th Cir. 1957), preclude consideration of an issue on appeal not raised in the District Court.

3. Petitioner challenged the search of Maxfill's vehicle not only upon the theory that the officers were without probable cause to stop Maxfill, but also upon the theory that the search was in violation of the holding in Chimel v. California, 395 U.S. 752 (1969), as a search, incident to an arrest, in excess of the permissible scope of such a search. The Court of Appeals for the Ninth Circuit upheld the trial court as follows:

> "Appellant questions the scope of the search of the Maxfill automobile. That question was decided against appellant, however, in Chambers v. Maroney, 399

U.S. 42 (1970)."

The decision in Chambers does not require the conclusion reached by the Court of Appeals for the Ninth Circuit, but instead requires a holding that the search exceeded the permissible scope. In Chambers, this Court concluded that the automobile was a " . . . fleeting target for a search."

The facts here are substantially different, for the automobile was not a fleeting target. It was, in fact, in the possession and under the control of law enforcement officers. Its owner and only other occupant were likewise in custody. The officers, the car and its occupants were all immediately in front of a Highway Patrol station which provided a reasonable and safe place for the automobile and its occupants

pending the obtaining of a search warrant. The holdings of this Court in Chimel v. California and Chambers v. Maroney were not followed by the Ninth Circuit.

4. The Affidavit in support of the search warrant is to be tested by the decisions of this Court in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). An excellent analysis of these requirements is found in McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969). There the court advised as follows:

> "Before issuing a search warrant, a magistrate must satisfy himself that the affidavit meets the test of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). This test has two aspects: (1) whether

the information is, in fact reliable, and (2) whether the 'underlying circumstances' as to how the informant came by his information demonstrate sufficient probability of credibility to allow the search of the premises in question.

This two-pronged test must be weighed with the added analysis of Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). When the affidavit is based upon the hearsay of an informant, the statement as to reliability of the informant must include as well the affiant's 'reason in support of this conclusion'. The additional significance we

glean from Spinelli is that the magistrate must assure himself that the affidavit is not merely based upon 'casual rumor circulating in the underworld or an accusation based merely on the individual's general reputation'. 89 S.Ct. at 589." 406 F.2d at 1268.

Justification for the commissioner to have issued the warrants in the instant case must be found within the affidavits themselves. These affidavits clearly fall far short of the requirements annunciated in Aguilar and Spinelli because the informant's reliability was not alleged, nor were circumstances alleged indicating the source of the informant's information. They are thus not legally capable

of supporting the issuance of the warrants. As the court said in McCreary:

> " . . . where the affiant officer does not know the informant, it would be impossible for the affiant to vouch as to the informer's reliability." 406 F.2d at 1269.

Assuming that Maxfield was legally arrested and that the commissioner had reasonable grounds to determine that the informant was in fact reliable, the evidence seized pursuant to the search of the Thunderbird must nevertheless be excluded. In Durham v. United States, 403 F.2d 190 (9th Cir. 1968), the following rule was pronounced:

> "The facts submitted to the commissioner must be

be sufficient to justify a conclusion by him that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued. . . . There must be reasonable grounds for believing that the immediate search for which authority is sought may be fruitful." 403 F.2d at 193.

The informant gave no information concerning the Thunderbird. The only reference, direct or inferential, to the Thunderbird in the Affidavit was that Tolliver removed a brown bag from its trunk. This information raises the agent's allegation to nothing more than speculation that the Thunderbird contained contraband. The warrant was upheld in violation of Aguilar,

Spinelli, and Durham.

5. In its Statement of Facts the United States Court of Appeals for the Ninth Circuit said,

> "On the basis of this arrest, the discovery of heroin and cocaine, the events previously observed and the informant's tip, Krusko obtained a search warrant for the Thunderbird from which it was believed that the narcotics had been obtained originally."

It is apparent from this statement that the Court of Appeals considered such critical facts as,

a) The observation by Krusko of other bags in the Thunderbird. (Opinion p. 2)

b) The identification of the informant. (Opinion p. 3)

c) The previous reliability of

the informant. (Opinion p. 3)

d) The similarity between the bag removed from the Thunderbird by Tolliver and the bag removed from the Oldsmobile by Krusko. (Opinion p. 4)

These facts were not presented to the magistrate in the Affidavit. (See Appendix E). Nevertheless, these critical facts were considered by both the District Court and the Court of Appeals in concluding that the search warrant was validly issued. These holdings are in contravention of the opinions of this Court in Aguilar v. Texas, 378 U.S. 108 (1964), and the decisions by other Courts of Appeal in McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969), Melvin v. United States, 419 F.2d 136 (4th Cir. 1969); and United States v. Roth, 391 F.2d 507 (7th Cir. 1967), and against the Ninth

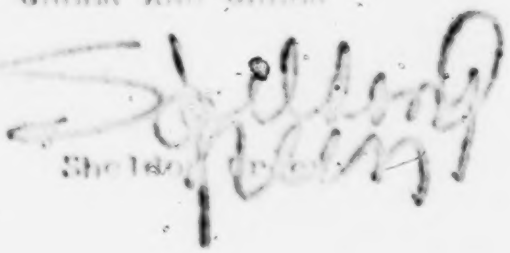
Circuit's own decision in Durham v. United States, 403 F.2d 190 (9th Cir. 1968), which held,

> "In reviewing determinations of probable cause, the court may consider only the information brought to the magistrate's attention. [citing authority]. It has also been held that Fed. Rule Criminal Procedure 41(c)'s provision that a warrant may issue 'only on affidavit . . . establishing the grounds . . . for issuance' means that the affidavit by itself must establish probable cause for a Federal search warrant. [citing authority]." 403 F.2d at 194, Note 5. (Emphasis added).

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reviewed on the Petition for a Writ of Certiorari for the reason that the opinion holds five Federal questions in conflict with applicable decisions of this Court and of other Courts of Appeal on the same matters.

GREEN AND GREEN



Sheldon Green

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. CHARLES TOLIVER, *Appellant.*	No. 25946

[October 28, 1970]

Appeal from the United States District Court for the Northern District of California

Before: ELY, HUFSTEDLER and TRASK, Circuit Judges.

TRASK, Circuit Judge:

The appellant, Charles Toliver, was found guilty following a jury trial in the district court on two counts of an indictment charging violations of 21 U.S.C. § 174 (Concealment and Transportation of Heroin). His trial was severed from that of his co-defendant, Hillard Maxfill. This court's jurisdiction to review the conviction rests on 28 U.S.C. § 1291. We have reviewed the entire proceeding and affirm the judgment of the trial court.

On July 31, 1969, the Bureau of Narcotics and Dangerous Drugs in San Francisco received a tip from an unidentified caller that a transfer of heroin was to occur in approximately one-half hour at a certain location in Oakland. The informant gave the names and physical descriptions (including clothing) of the parties who would be involved, the cars they would be driving, and a description of a female companion that would be present. The voice of the informant was recognized by another agent as belonging to a person who had provided reliable information in the past.

Upon arriving at the specified location, federal and state agents were able to confirm by observation many of the essential facts contained in the tip given by the informant. Appellant, who was previously known to the narcotics agent in charge as a drug offender, finally arrived in a red sports car exactly as the informant had stated. After a short conversation, appellant and Maxfill departed in a 1967 Oldsmobile to another location in Oakland

where Maxfill parked the car. Appellant was observed as he exited the car, walked to the intersection, turned the corner and proceeded to the trunk of a 1969 yellow Ford Thunderbird parked out of view of the Oldsmobile. There was room for another vehicle both in front of, alongside and behind the Thunderbird. The agents continued to observe as appellant opened the trunk of the Thunderbird, glanced around, and then removed a brown paper bag from amongst other brown paper bags. The bag had a distinctive V-shaped tear in the top.

Appellant returned with the paper bag to the Oldsmobile and he and Maxfill returned to their original meeting place. They got out of the car empty-handed and entered a nearby building. Shortly thereafter, Maxfill, accompanied by his female companion, came out of the building and drove off in the Oldsmobile followed by the narcotics agents.

At the toll gate on the San Francisco-Oakland Bay Bridge, the Oldsmobile pulled in behind a surveillance car and then came to a stop as the line of cars halted for the toll booth. The other surveillance car pulled in behind the Oldsmobile. Agent Krusko left the front surveillance car and approached the driver's side of the Oldsmobile, identified himself to Maxfill as a narcotics agent, and asked for identification. As Maxfill began to get out of the car, Krusko, an experienced narcotics agent, noticed in plain view in a litter basket on the transmission hump a plain brown paper bag with a knotted rubber contraceptive protruding out of it, and containing, apparently, some white powder.

Maxfill was formally placed under arrest and the brown paper bag was removed from the litter basket. The bag had the same distinctive V-shaped tear in the top as Krusko had observed with respect to the bag in appellant's possession earlier. The bag contained both heroin and cocaine. On the basis of this arrest, the discovery of heroin and cocaine, the events previously observed and the informer's tip, Krusko obtained a search warrant for the Thunderbird from which it was believed that the narcotics had been obtained originally.

Later that evening appellant was apprehended and a key fitting the trunk of the Thunderbird was recovered from his pants pocket. The next day the car was searched and additional quantities of heroin and cocaine were discovered. Appellant's motion to sup-

press the narcotics was denied after an evidentiary hearing as was his motion for reconsideration.

Appellant was indicted along with Hillard Maxfill in Count I for concealment and transportation of the heroin discovered at the San Francisco-Oakland Bay Bridge; appellant was named alone in the second count for concealment and transportation of the heroin discovered in the Thunderbird.

The government contends that appellant has no standing to challenge the seizure of the contraband at the bridge. It points out that appellant was not present at the time and has never claimed a possessory interest in, or control over, the Oldsmobile. Therefore under the teachings of *Jones v. United States*, 362 U.S. 257 (1960), and the decision of this court in *Diaz Rosado v. United States*, 357 F.2d 121 (9th Cir.), *cert. denied*, 385 U.S. 856 (1966), appellant has no position to object. We agree. The rule was stated in *Jones*, supra:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . ." 362 U.S. at 261.

The rule in *Jones* was approved recently in *Alderman v. United States*, 394 U.S. 165 (1968), where the Court emphasized that the exclusionary rule did not accord special standing to conspirators and co-defendants whose privacy was not invaded. 394 U.S. at 171-175.

Even assuming standing, however, appellant is not entitled to relief. Appellant contends that agent Krusko lacked probable cause to arrest Maxfill and seize the narcotics from his car at the toll plaza. The pattern of probable cause began to develop when the informant described to the agents the episode which was about to occur. He was identified as a reliable informer. His reliability was further established when the facts developed substantially as the informant said they would.[1]

---

[1]Subsequent observations by surveillance can supply underlying circumstances and corroborate reliability and establish probable cause. *United States v. Chin Dan Fook*, 413 F.2d 1016 (2nd Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

The transaction which was unfolding was obviously devious, clandestine and suspicious. It thoroughly warranted the action of Krusko in following Maxfill to the bridge. Once there Maxfill unknowingly boxed himself in. He drove up behind one surveillance car already stopped at the toll line and gave Krusko an opportunity to get out and walk up to Maxfill, identify himself and ask for identification. Maxfill turned to get out of the car, Krusko then noticed what appeared to him, as an experienced narcotics agent, to be heroin in plain view inside the car. Probable cause for the arrest existed at this moment and Krusko proceeded to make it.[2]

Appellant questions the scope of the search of the Maxfill automobile. That question was decided against appellant, however, in *Chambers v. Maroney*, 399 U.S. 42 (1970).

He also argues the insufficiency of the affidavit in support of the warrant to search the yellow Thunderbird.[3] We have examined the affidavit in the light of appellant's cited authorities and find it sufficient. It not only outlined the details of the tip but the events which took place under the agents' eyes which corroborated the tip, and the subsequent recovery at the bridge of the paper bags with narcotics in it which was similar in appearance to the paper bag taken from the Thunderbird. We believe the affidavit sufficient and the warrant valid.

Other alleged errors such as the alleged misconduct of counsel, error in the admission of evidence and the sufficiency of the evidence have been considered. They do not support the contentions of the appellant.

The judgment is affirmed.

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[2]*Busby v. United States*, 296 F.2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962).

It is argued that the arrest occurred when Maxfill stopped behind the lead surveillance car and the other surveillance car stopped behind appellant. This delay was primarily the result of the normal functioning of the toll line. In any event, the line which appellant selected was of his own choosing and did not involve a maneuvered detention of his automobile by the agents.

[3]Reliance is placed upon *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

ARCATA GRAPHICS, SAN FRANCISCO 10-30-70—300

APPENDIX B

THE COURT: Is the matter submitted?

MR. SLOAN: Certainly, Your Honor.

THE COURT: The motion to suppress, each and all are denied.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	
v.	No. 43230 JUDGMENT AND COMMITMENT
CHARLES TOLIVER	

On this 27th day of March, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of Violation: Title 21 U.S.C., Section 174 - Concealment and Transportion of Heroin as charged in Counts 1 and 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being

shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on count 1 and ten (10) years on count 2. IT IS FURTHER ORDERED that the sentence on count 2 commence and run concurrently with count 1.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant. JUDGMENT AND COMMITMENT FILED this 30th day of March, 1970.

s/ Stanley A. Weigel
United States District Judge

APPENDIX D

Rules of Criminal Procedure

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

18 U.S.C. § 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

APPENDIX E

Omitting the formal parts, the Affidavit For Search Warrant recited as follows:

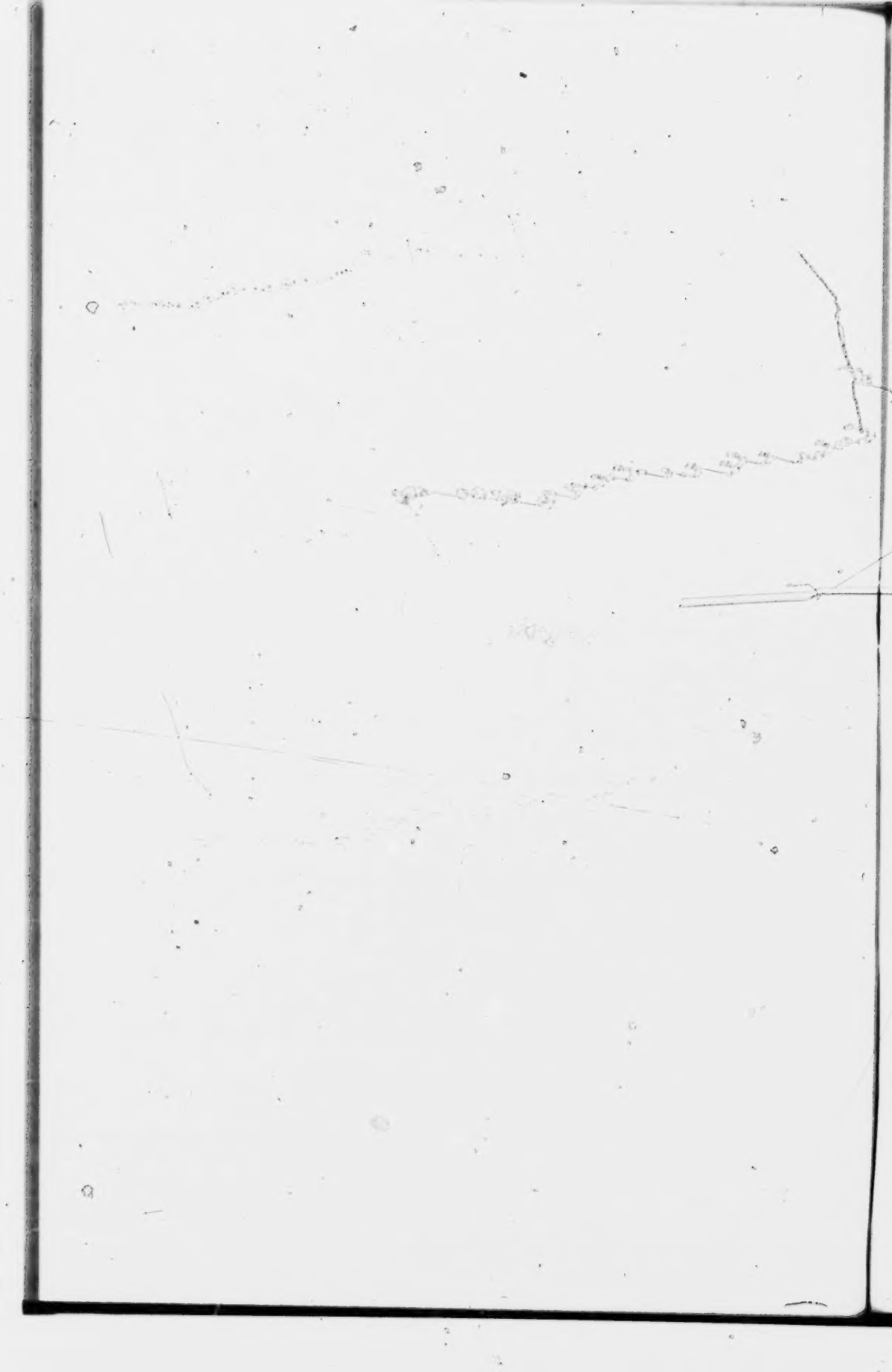
"I have been a Special Agent of the Bureau of Narcotics and Dangerous Drugs since April of 1968. At approximately 5:30 p.m. on July 31, 1969 I received a telephone call from an individual unknown to myself. The caller stated that at approximately 6:00 p.m. on July 31, 1969 a male negro wearing a green shirt, pants, and hat and nicknamed"Hitler" would, accompanied by a female negro, arrive in a 1967 silver blue Oldsmobile, bearing California License UXS 885 and park the vehicle on Grove Street between 47th and 51th Streets in Oakland, California. Several minutes after 6:00 p.m. this individual would

be met by a male negro identified as Charles Tolliver. Tolliver would be driving a red sportscar and deliver several ounces of heroin to "Hitler".

Tolliver is known to me as a prior violator of narcotic laws. He has been convicted for Narcotic Violations in both Federal and State Courts.

At approximately 5:50 P.M. on July 31, 1969, I observed a 1967 silver blue Oldsmobile bearing California License number UXS 885 parked on Grove Street, between 47th and 51st Streets in Oakland, California. Seated in the Oldsmobile was a female negro and standing beside the Oldsmobile was a male negro, wearing green shirt, pants, and hat.

At approximately 6:20 P.M. on



July 31, 1969, a male Negro, known to me as Charles Tolliver arrived and parked a Red 1968 Excalibur Roadster bearing California License number WOA 733 directly across the street from the 1967 Oldsmobile. The above mentioned Negro female exited the 1967 Oldsmobile and Tolliver entered the vehicle and seated himself in the front passengers side. At approximately the same time, the Negro male dressed in green, entered the 1967 Oldsmobile, and under my constant surveillance, drove to the corner of 20th and Brush Streets in Oakland, California, and parked on Brush Street. Tolliver was observed to exit the 1967 Oldsmobile and walk, empty handed, to the trunk of a yellow 1959 Ford Thunderbird bearing California License number

AZF 880, which was parked on 19th Street, facing north, near the corner of 19th and Brush Streets, Oakland, California. Tolliver was observed to open the trunk of the yellow 1959 Thunderbird and remove a brown paper bag which he carried back to the 1967 Oldsmobile and re-entered the passenger's side of the vehicle, still in possession of the brown paper bag. During Tolliver's absence from the Oldsmobile, the driver of the Oldsmobile, did not, at any time, exit the vehicle.

The Oldsmobile, under constant surveillance, returned to approximately the same spot on Grove Street, where it had been previously parked. Tolliver and the driver both exited the vehicle, empty handed, and entered a building adjacent to the parked vehicle. The driver and the

previously described female negro exited the building and entered the 1967 Oldsmobile. The driver then drove the vehicle away from the area under constant surveillance and as he stopped at the toll plaza of the San Francisco-Oakland Bay Bridge several other narcotic agents and I approached the vehicle. I informed the driver of my identity, told him I was conducting a narcotic investigation, and asked him to produce his identification. At this time, I observed in plain view, a prophylactic containing a quantity of white powder, believed by me to be narcotic drugs in a litter bucket on the floor of the vehicle between the driver and his passenger. I placed the driver and negro female under arrest, determined that he was using the nickname "Hitler",

and by a chemical field test determined that the powdered substance was, in fact, a narcotic drug."

s/ Kenneth S. Krusko
Special Agent BNDD

Sworn to before me, and subscribed in my presence, July 31, 1969.

s/ Harold W. Jewett

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1021

CHARLES TOLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of concealing and transporting heroin in violation of 21 U.S.C. 174. He was sentenced to ten years' imprisonment on each count to run concurrently. The court of appeals affirmed (Pet. App. 28-31). Petitioner challenges here, as he did below, the validity of the seizure of heroin without a warrant from his co-defendant's automo-

bile, and the validity of a search warrant obtained prior to a search of his own automobile.

The evidence, which is not in dispute, is fully set forth in the opinion of the court below. It showed that a federal narcotics agent received information from an unidentified caller that certain persons were about to meet at a designated location to transfer narcotics. The informer gave names, physical descriptions, and a description of the cars to be driven. The voice of the informer was recognized by another agent as belonging to a person who had provided reliable information in the past. Upon the agents' arrival at the specified location they observed petitioner, who was known by the agents to be a drug offender, drive up in a red sports car as previously described by the informer and then get into an Oldsmobile, also previously described, with his codefendant, Maxfill. Petitioner and Maxfill then proceeded to another location where petitioner alighted from the Oldsmobile and went to a parked yellow Thunderbird. He retrieved a brown paper bag from the trunk and returned with the bag to the Oldsmobile. After dropping off petitioner at the original meeting place, Maxfill drove to a toll bridge and stopped behind one of the surveillance cars. The other surveillance car pulled in behind the Oldsmobile. The agent in the front car then approached the driver's side of the Oldsmobile. The agent identified himself as a narcotics agent and asked for Maxfill's identification. Maxfill got out of his car and, as he did, the agent noticed in plain view on the transmission hump a brown paper bag with a

knotted rubber contraceptive protruding from it. The bag apparently contained white powder, which was later determined to be heroin. Maxfill was then arrested and the bag seized. On the basis of the observed events, the discovery of the heroin, and the informer's tip (see Affidavit, Pet. App. 36-41), a search warrant was obtained for petitioner's Thunderbird, from which the narcotics had been originally obtained. The subsequent search of the Thunderbird revealed additional amounts of heroin.

The court of appeals properly rejected petitioner's claim that the heroin seized from his codefendant's Oldsmobile should have been excluded. The court correctly held that petitioner had no standing to challenge that seizure, *Jones* v. *United States*, 362 U.S. 257, and in any event, that it was proper. As the above evidence indicates, the informer's tip and the agent's discovery of the bag, in plain view, which was reasonably believed to contain heroin were more than sufficient to establish probable cause for the arrest and the concurrent seizure. *Draper* v. *United States*, 358 U.S. 307.[1]

Petitioner's contention that the search warrant obtained for the search of the Thunderbird was based

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[1] Although petitioner contends that the observation of the bag which preceded the arrest occurred when the codefendant was blocked-in on the toll bridge, it is clear, as the court of appeals points out (Pet. App. 31. n. 2), that the delay was primarily the result of the normal functioning of the toll line and that a formal arrest of Maxfill was not made until after the heroin was seen by the agent. Since the agent had a right to be in the position he was when he saw the bag, the case is governed by *Rios* v. *United States*, 364 U.S. 253; *Harris* v. *United States*, 390 U.S. 234.

on an insufficient affidavit is also without merit. The affidavit narrated the details of the events that the agents observed, which fully corroborated the informer's tip. It also included a statement that a brown paper bag was taken from the trunk of the Thunderbird by petitioner and carried to the codefendant's automobile where the narcotics were subsequently discovered. The affidavit thus more than met the requirements spelled out in *Spinelli* v. *United States*, 393 U.S. 410.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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